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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 598

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioner,

v.

ROSCOE HUMPHREYS,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND APPENDIX

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ROSCOE HUMPHREYS,
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in this case on August 31, 1962.

OPINION BELOW

The Supreme Court of Appeals of Virginia rendered a written opinion, and by order affirming the judgment of the lower court. (See Appendix, pp. 17, 28)

JURISDICTION

The judgment of the Corporation Court of the City of Bristol, Virginia, was entered May 26, 1961, and the Supreme Court of Appeals of Virginia affirmed the judgment, August 31, 1962. (Appendix, infra)

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

In compliance with Rule 23 the following is the procedural history of the case in the State Courts of Virginia:

During the trial, which began on May 25, 1961, Counsel for Humphreys called the president of the Local Union, an affiliate of petitioner, and on direct examination said:

> "Q. I am not talking about everything. I am talking about a bonding committee. *You even had that to bond your 'goons' out of jail.*" (Emphasis supplied.)
>
> "Mr. Stallard: Mr. Warren used the word 'goon'. I don't know what it is, something disrespectful. I don't think it is a proper question. There is no evidence of any goons. They were all members of the union and had some difficulty. I object."
>
> "The Court: Sustain the objection. There is no evidence *defining* a goon or indicating that anyone came within the definition. The jury will disregard the use of that word. Confine the examination to cross examination and not some other." (R. 113).

In argument to the jury, Counsel for Humphreys used

the words, "black cloak and dagger", in referring to the actions of members of the Local which was on strike.

After the verdict, Counsel for the Brotherhood made the following motion:

> "Mr. Stallard: If it please the Court, counsel for the defendant, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, moves the Court to set aside the verdict of the jury in this case against them and Price and Parks in the sum of $4,000 as being contrary to the law and the evidence in the case, and on the further ground that the jury was improperly instructed, namely, the Court refused to give defendant's instructions marked A.E.F. and G. F being an instruction incorporating the Norris-La-Guardia Act which is Section 106, Title 29 of the U.S. Code Annotated and approved in principle by the Supreme Court of the United States, 67 Supreme Court Reporter, page 775, which was specifically passed by Congress applying to all Courts in the United States and for the specific protection of labor unions and corporations.
>
> Counsel also moves to set aside the verdict on the further ground that counsel for the plaintiff appealed to the passion and prejudice of the jury when he used language, "Black," "Cloak," and "Dagger", and also quoted the evidence to the effect that the United Brotherhood of Carpenters and Joiners approved the strike, whereas they approved strike benefits, but not the strike. He referred to the strike that the United Brotherhood would have you believe it was a wildcat strike. There is no evidence of that effect.

And counsel also referred to the Tennessee case most recently meaning counsel for the defendant, United Brotherhood of Carpenters and Joiners, believe that he had reference to a case of United Mine Workers in which John L. Lewis testified in Knoxville recently when the jury gave a large verdict up in approximately $300,000.

Counsel for the defendant, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, makes the same motion in reference to the verdict given in behalf of the plaintiff in the sum of $7000 against the defendant, United Brotherhood of Carpenters and Joiners of America and the Local 3092, and assigns the reasons for the motion the same as those in the motion on the $4,000 verdict." (R. 316-318)

ERRORS ASSIGNED

The following errors were assigned by the Brotherhood in its petition to the Supreme Court of Appeals of Virginia:

1. The Court erred in overruling the Defendant's motion made at the conclusion of the Plaintiff's evidence and renewed at the conclusion of all the evidence to strike Plaintiff's evidence as being insufficient in law to sustain a recovery against the defendant.

2. The Court erred in refusing to give Defendant's Instructions A, E, F and G, and requiring Defendant to amend Defendant's Instruction A-3.

3. The Court erred in giving Plaintiff's Instructions 1-A, 2, 3, 4, 5 and 6.

4. The Court erred in overruling Defendant's motion to set aside the verdict in favor of the Plaintiff and entering final judgment for Defendant.

5. The Court erred in overruling Defendant's motion to set aside the verdict in favor of Plaintiff as excessive and ordering a new trial.

6. The Court erred in permitting the Plaintiff to introduce Plaintiff's Exhibit 1 over Defendant's objection, which was an executed NLRB Form 501 of a charge of an unfair labor practice against Bristol Door & Lumber Company, Incorporated, employer, filed November 18, 1958, by Lumber & Sawmill Workers Union, Local 3092, which was after the strike, and was signed by A. O. McKinney.

7. The Court erred in giving Plaintiff's Instruction No. 7-A.

8. The Court erred in refusing to give Defendant's Instruction A-2.

Although the Supreme Court of Appeals of Virginia granted the Brotherhood a Writ of Error on said assignments, no reference was made in the Court's opinion to the Brotherhood's *Fifth Assignment of Error*, under which the Brotherhood argued that the verdict in favor of Humphreys was excessive because Counsel for Humphreys appealed to the prejudice of the jury.

Under the Fifth Assignment of Error, Counsel for the Brotherhood said, among other things, the following:

"The verdict against Defendants United Brotherhood, Local Union 3092, Parks and Price, was so ex-

cessive as to evince passion and prejudice, but not corruption.

"The Plaintiff did not see a doctor after he was assaulted on September 2, 1958, until the following day, and he did his usual day's work for Bristol Door & Lumber Company on the following day. Plaintiff did see a doctor on September 3, 1958, after he had been assaulted by the two Strouths late in the afternoon.

"It is submitted that the lower court should have reduced the verdict in the sum of FOUR THOUSAND DOLLARS ($4,000) on the ground that it was excessive. The court had the power under Section 8-350 of the Code of Virginia, 1950, to do this or to set the verdict aside as excessive and order a new trial on the question of damages. (E. I. DuPont Co. v. Taylor, 124, Va. 750.)

"It is respectfully submitted that the jury was prejudiced against the Defendant United Brotherhood because it was an International Labor Union.

"Then counsel for plaintiff in his examination of witnesses referred to defendants as 'goons'. (R., p. 112)

" 'Q.' I am not talking about everything. I am talking about a bonding committee. You even had that to bond your 'goons' out of jail.'

"Mr. Stallard: Mr. Warren used the word 'goon.' I don't know what it is, something disrespectful. I don't think it is a proper question. There is no evidence of any goons. They were all members of the Union and had some difficulty. I object.

"The Court: Sustain the objections. There is no evidence defining a goon or indicating that anyone came within the definition. The jury will disregard the use of that word. Confine the examination to cross examination and not some other.'

"In argument to the jury counsel for the plaintiff used the words 'black cloak and dagger.'"

QUESTIONS PRESENTED

Whether the petitioner had a fair and impartial trial and equal protection of the law as protected against infringement by State instrumentality under the "due process" clause of the Fourteenth Amendment of the Constitution of the United States.

STATUTES INVOLVED

The pertinent statute and constitutional provisions are printed in the Appendix, infra, p. 31-32

STATEMENT OF CASE

For many years prior to July, 1958, Defendant Lumber & Sawmill Workers Union No. 3092 of Bristol, Virginia, an autonomous body, with its own constitution and by-laws, had a written contract with Bristol Door and Lumber Company, Inc., of Bristol, Virginia, covering wages and working conditions of approximately 140 of its members. Local 3092 held a charter from Petitioner United Brotherhood during this period of time.

Defendant Local Union 3092 and Bristol Door & Lum-

ber Company, Inc., were unable to negotiate a new contract and a strike ensued which lasted from July 29, 1958, until November 11, 1958.

Prior to calling the strike, Local Union 3092 took a secret strike vote and a majority of its members voted to strike. The Plaintiff Humphreys and Defendant's Price, Parks, Halvie E. and H. C. Strouth, were members and all served on the picket line for several weeks during the strike.

Local 3092 is now defunct, but its immediate past President Barney Hankle, called by the Plaintiff as a witness, testified that he requested the Defendant United Brotherhood to assign one of its representatives to help the local in its negotiations and to advise the local on questions which might arise. As a result, Arcil Dishner was assigned as a representative of the Defendant United Brotherhood. Prior to the strike Dishner came to Bristol, Virginia (R. p. 101). But A. O. McKinney, Representative of the General President of United Brotherhood, lived in Johnson City, Tennessee, nearby, at the time, and was a member of a local union in Bristol, Virginia, which was affiliated with United Brotherhood, was negotiating certain other contracts for other companies in Bristol, Virginia, with Mr. Waldo Miles, who was also the attorney for Bristol Door and Lumber Company, Inc. McKinney testified that Mr. Miles asked him to help him (Miles) settle the strike. While Mr. Miles did not remember requesting Mr. McKinney, he (Miles) did testify that neither he (Miles) nor A. O. McKinney thought the members of Local 3092 should have gone on strike, and Miles testified that McKinney indicated he did not think a strike wise. (R. p. 135). Mr. McKinney and Mr. Miles drafted a proposed contract

for the parties and Mr. McKinney presented same to the members of Local 3092. The members voted to reject the proposed contract and threatened to throw A. O. McKinney out of its meeting. Mr. William Nidiffer, Vice President of the Union, called by the Defendant as a witness, testified: "that they did not want us to strike," meaning A. Dishner and A. O. McKinney (R. p. 172).

The Plaintiff testified that on a Thursday night prior to September 2, 1958, and Wednesday, September 3, 1958, he heard A. O. McKinney say on the union floor, the following: (R., p. 19)

> "Q. What did he say with reference to non-strikers?
>
> "A. Well, he said, 'Fellows, I hear they's some talk that some of you wants to go back in to work up there,' Said, 'If you happen to break over the picket line and go back to work, if that company finds out we are weakening, we won't get a thing,' and said, 'If any of them does go back into work, all I can tell you is to entertain them on the way backwards and forth', and said, 'watch what your say when you entertain them, some of them might have a bug planted on them.' "

Burt Smith, called as a witness by Plaintiff, testified that a nicely dressed man (but he did not identify Mr. McKinney) said on the floor of the Union, the following: (R., pp. 68-69.)

> "Q. Now at these union meetings that you attended during the time the strike was going on, were any statements ever made by the persons in charge of those union meetings concerning entertaining non-strikers or those who went back to work?

"A. Well, these men, I reckon they was the head of the union or whatever it was.

"Q. The same two men we have been talking about?

"A. That's right; told us fellows that was there on the sidewalk when walking to say nothing to nobody, anybody who asked, where we had any outsider come up, say nothing to nobody and if anybody commenced asking questions for them to tell them to join the union and find out what it was all about.

"Q. Was anything said about what would be done to non-strikers and persons who went back to work?

"A. First one and then another would get up and ask a question and these men said, 'Don't bother nobody on the strike while you are walking. If you see anybody coming on the sidewalk, give them room.' Then it went on and they divided it up and one walked by himself and would turn and come back. They said, 'Don't block the street. Have nothing to say to nobody.'

"Q. What else did they say about between home and work, if anything?

"A. Well, there was one man and another there, I can't say who, said, 'What about these here men coming in over the yard and can't bother them?' Said, 'All that works these new scabs went in, all works, whenever the job is over and strike, there will be a new contract and we will bring them out: not one of them will have a job.' Some asked questions, you know kinda how one fellow is and another what to do, and this fellow said, 'Don't bother nobody while it is on now. Later they can be entertained.'"

The testimony of Plaintiff was denied by A. O. McKinney, and by former members and officers of the Local Union, called by the Plaintiff as witnesses. Only the Plaintiff testified that Price, Parks, Halvie E. and H. C. Strouth were present when A. O. McKinney was supposed to have suggested that those who went back to work should be entertained. The Plaintiff did not testify that the aforesaid Defendants heard A. O. McKinney say anything on the floor of the Union. Evidence was introduced that Plaintiff and Defendants Price and Parks had a scuffle in Webb's Filling Station, located in Tennessee near Bristol, Virginia. The evidence shows that on September 2, 1958, Plaintiff returned to work at Bristol Door and Lumber Company, Inc., and other members of the Union had also returned to work. Plaintiff introduced no other witness who saw the scuffle, although there was evidence to the effect that several people were at the filling station and must have known something about it. Webb did testify but he did not see the incident. (R., pp. 59-63).

Plaintiff went to work the next day, September 3, 1958, at Bristol Door & Lumber Company, Inc., and worked all day, although he claimed he had been assaulted on September 2, 1958. He described the injuries he received on September 2, 1958, to the jury, but apparently he was not injured sufficiently to see a doctor the night he was hurt or stay away from work the next day.

The jury gave a verdict against Petitioner United Brotherhood, Defendants Local 3092, Parks and Price for the sum of Four Thousand Dollars ($4,000).

The Plaintiff further testified that he was assaulted by Defendants Halvie E. Strouth and H. C. Strouth on Sep-

tember 3, 1958, after he had reached his home in Sullivan County, Tennessee, and further that he had worked on that day at Bristol Door & Lumber Company, Inc. Medical testimony was introduced, but the physician said Plaintiff had not suffered permanent injuries. The physician presented a bill in the sum of $15 for his services. Plaintiff was not confined to a hospital.

The jury returned a verdict against Defendants United Brotherhood and Local 3092, in the sum of SEVEN THOUSAND DOLLARS ($7,000).

Counsel for the Plaintiff referred to the Defendants as "Goons", "Black Cloak and Dagger People" in his argument to the jury. Prior to his argument the Court had warned counsel not to use the word "goon."

The Plaintiff testified that he went into his house and got a rifle and shot into the car being driven by the Strouth brothers after he was assaulted. Both Plaintiff and the Strouths secured felony warrants against each other. The cases were referred to the Grand Jury, but none of the parties appeared to testify, although the Plaintiff had given an appearance bond and testified he was at the court house, but he was never called before the Grand Jury. Finally, the cases were dismissed upon recommendation of the Attorney General of Tennessee.

The Plaintiff admitted on cross examination that he knew Price and Parks and was a particular friend of the Strouths, and had gone around with the Strouth brothers

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Appeals of Virginia erred:

1. In affirming the judgment of the Corporation Court of the City of Bristol, after Counsel for Humphreys appealed to the prejudice of the jury by using highly inflammatory language, such as "goons", "Black cloak and dagger tactics", and thereby denied the Brotherhood and other defendants a fair and impartial trial and equal protection of the law under the due process clause of the Fourteenth Amendment of the Federal Constitution.

2. In refusing to reverse the judgment of the Corporation Court of the City of Bristol, on the ground the verdict had been secured on argument not based on facts before the jury and to hold that the Brotherhood was entitled to a fair and impartial trial under the Fourteenth Amendment to the Federal Constitution.

REASONS FOR GRANTING THE WRIT

The important question presented in this case is the constitutional protection of the rights of the Brotherhood to a fair and impartial trial on the facts, and to the equal protection of the law. The basic issue is whether the Brotherhood and its members have had a fair and impartial trial and equal protection of the law as protected under the due process clause of the Fourteenth Amendment.

In New York Central Railway Co. v. Johnson, 279 U.S. 310, 73 L.Ed. 706, 49 S.Ct. 300, this court reversed the C.A. (27 Fed. (2nd) 699), and Mr. Justice Stone said on Page 303:

"At the close of the case it was apparent that the attempted or suggested defense that respondent's condition was due to syphilis was without substance, and it was formally abandoned by petitioner's Counsel in his address to the jury.

"In this condition of the record, the repeated statements of Counsel that syphilis was the defense, coupled with vituperative language which we have quoted and statements that petitioner had charged respondent with indecency, made in face of testimony of respondent's own witnesses that the disease was frequently transmitted by the use of drinking cups or other innocent means *was not fair comment* on the evidence or justified by the record. Cf. Cherry Creek Nat'l Bank v. Fidelity and Casualty Co., 207 App. Div. 787, 202 N.Y.S. 611; Grabously v. Baumgart, 128 Mich. 267, 272, 87 N.W. 891; Fisher v. Weinholzer, 91 Minn. 22, 25, 97 N.W. 426; Strudgeon v. Village of Sand Beach, 107 Mich. 496, 504, 65 N.W. 616. *Their obvious purpose and effect were improperly to influence the verdict by their appeal to passion and prejudice.*" (Emphasis supplied.)

This court has also held that a fair and impartial trial on the facts is the essence of due process. Ross v. State, 341 U.S. 918, 95 L.Ed. 1352.

In the instant case, the Corporation Court of the City of Bristol and the Supreme Court of Appeals of Virginia erred in not setting aside the verdict of the jury, because the Supreme Court of Appeals of Virginia had held in Norfolk & Western Railway Co. v. Allen and Sons, 122 Va. 603, 95 S.E. 406, which was an action against a rail-

road for diminution of plaintiff's water power, there was no evidence before the jury as to the wealth of the defendant, but Counsel for plaintiff in his address to the jury was allowed to comment over defendant's objection upon the great wealth of the defendant and its disregard of the law of God and man.

The Court said in setting aside the verdict:

> "This court has more than once reprobated in no uncertain terms the practice of ejecting in argument of counsel statements calculated to inflame the minds of jurors, and tending to produce verdicts as a result of prejudice rather than a calm consideration of the evidence. *Every litigant, natural or artificial is entitled to a fair and impartial trial and there should be excluded from the tribunal which is to try the case, whether judge or jury, everything that has a tendency to aid such tribunal in doing impartial justice between litigants.*" (Emphasis supplied.)

Thus, the Supreme Court of Appeals of Virginia recognizes that to permit Counsel to call the members of the Brotherhood "goons", and to accuse them of using "Black cloak and dagger tactics" would tend to "inflame the minds of jurors, and produce verdicts as a result of prejudice rather than a calm consideration of the evidence."

By not applying the above policy to the instant case, the Virginia Courts denied the union equal protection under the law, which this court is respectfully requested to correct.

The record unequivocally discloses that the petitioner was denied a fair and impartial trial. The issue involved is

one of paramount importance to every citizen, and especially to the Brotherhood and its members.

The Virginia Courts have also denied the Brotherhood equal protection under the policy established by it in Norfolk and Western Railway Co. v. Allen & Sons, supra.

This court has steadfastly recognized that litigants, natural or artificial, are entitled to a fair and impartial trial and that this right is protected by the Fourteenth Amendment of the Federal Constitution. Thus a Federal question exists.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

Present: Eggleston, C.J., and Spratley, Buchanan, Snead, I'Anson and Carrico, JJ.

Record No. 5435.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

-v-

ROSCOE HUMPHREYS

OPINION BY JUSTICE LAWRENCE W. I'ANSON
Staunton, Virginia, August 31, 1962

FROM THE CORPORATION COURT OF THE CITY OF BRISTOL
Joseph L. Cantwell, Jr., Judge

This is an appeal by the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein referred to as "United Brotherhood," from a judgment in the amount of $11,000 entered against it on two verdicts of a jury in an action for damages brought by the plaintiff, Roscoe Humphreys, against the defendants United Brotherhood; Lumber and Sawmill Workers Union No. 3092 of Bristol, Virginia, herein referred to as the "local union"; and D. R. Parks; Clayton Price; Halvie E. Stroud; and H. Chase Stroud, union members, for injuries sustained as a result of two assaults committed on the plaintiff by Parks, Price and the Stroud Brothers during the time the employees of Bristol Door and Lum-

ber Company, Inc., of Bristol, Virginia, hereinafter referred to as "Bristol Door," were on strike. The action against the Strouths was abated for lack of service of process, and the local union, Parks and Price did not seek a writ of error to the judgments entered against them.

The assignments of error relied on by the United Brotherhood are that the trial court erred (1) in not striking plaintiff's evidence and entering judgment for it on the grounds that no agency relationship had been shown to exist between it and the plaintiff's assailants, and even if they were agents of United Brotherhood they were not acting within the scope of their authority in assaulting Humphreys; and (2) in granting an instruction which included language telling the jury that the United Brotherhood could be held liable if they found from a preponderance of the evidence that it ratified the acts of the plaintiff's assailants.

The evidence stated, under the established rule, in the light most favorable to the plaintiff shows that the plaintiff, Parks, Price and the Strouth brothers were employees of Bristol Door and members of the Lumber and Sawmill Workers Union No. 3092 of Bristol, Virginia, a local union affiliated with, chartered by, and a component part of the United Brotherhood, an international labor organization consisting of 3000 local unions with a membership of more than 800,000.

The local unions are subject to and governed by the general laws of the United Brotherhood and local by-laws approved by it. Members of local unions are required to pay monthly dues, one-half of which is paid to the United Brotherhood as a per capita assessment. The funds de-

rived from the assessment are used to defray the operational expenses of the United Brotherhood and to pay wage benefits to members of local unions when they are on strike. The United Brotherhood has the power to discipline or expel members of local unions for violations of its mandates. Its general executive board has the power to authorize and sanction strikes by local unions, and the members of the locals receive financial and other support from United Brotherhood when a strike has been sanctioned by it. The general president has the power to deputize representatives to assist the local unions where labor disputes have arisen.

The local union was encountering difficulty in obtaining a new contract with Bristol Door, and upon its request the general president of United Brotherhood sent D. A. Dishner to Bristol as his representative to assist in the negotiations and to advise the local union on questions that might arise in connection therewith. A. O. McKinney, also a field representative of the general president, assisted Dishner and the local union committee in the negotiations, which lasted several weeks, but they were unsuccessful in their efforts to obtain a new contract.

When the plaintiff reported for work on the morning of July 29, 1958, he found that many employees were striking and forming a picket line around the Bristol Door plant, and he immediately joined them. That night a meeting of the union members was held to discuss and formally approve the strike. Dishner and McKinney addressed the meeting, advised the members how to organize their pickets, and told them that the United Brotherhood would pay strike wages during the time they were walking the picket

line and supporting the strike. McKinney also prepared and posted written instructions for their guidance.

For a period of five weeks the plaintiff performed picket duty on regular shifts around the premises of Bristol Door, and he, along with others performing such duty, was paid strike wages from monies supplied by United Brotherhood. Dishner was usually present while the picketing was carried on, and he frequently conferred with the participants while they were in the picket line. During this period negotiations with Bristol Door continued and the local union held one or two meetings each week with either McKinney or Dishner attending and addressing the members.

Reports on the contract negotiations, the progress of the strike, and the business conducted at the local union meetings were sent to United Brotherhood each week.

Sometime during the day of Thursday, August 28, 1958, the plaintiff stated to fellow union members that he was going to abandon his picketing and return to work. That night, at a meeting of the local union at which the plaintiff, Parks, Price, the Strouth brothers, and the two representatives of United Brotherhood were in attendance, McKinney addressed the members and he was quoted by the plaintiff as having said:

> "Well, he said, 'Fellows, I hear they's some talk that some you wants to go back in to work up there.' Said, 'Work, if that company finds out we are weakening, we won't get a thing,' and said, 'If any of them does go back to work, all I can tell you is to *entertain them on the way backward and forth.*' And said, 'Watch what you say when you *entertain them;* some

of them might have a bug planted on them." (Emphasis added.)

The following Tuesday, September 2, the plaintiff reported for work at Bristol Door, and at the end of the work day he obtained a ride to a service station where he waited to take a bus for home. In the meantime Parks and Price had left the picket line and pursued the plaintiff to the service station in an automobile operated by Halvie Strouth. The plaintiff was asked, "What did you go back for today?" and Parks and Price then assaulted him. After committing the assault they resumed their places in the picket line.

The next morning, September 3, the plaintiff reported for work and his employer sent him to the hospital where he was treated for the injuries received the previous afternoon.

After leaving the hospital that afternoon the plaintiff boarded a bus for home, and as he was getting off at his home Halvie Strouth, who was also a passenger on the bus, knocked him to the ground and pushed him underneath a wheel of the bus which ran over his hand, breaking a finger. Chase Strouth arrived on the scene and joined in the affray.

The strike continued until November 11, 1958, and shortly thereafter unfair labor practice charges were filed against Bristol Door in the name of the local union and the United Brotherhood. The complaint was signed by McKinney as the representative of both United Brotherhood and the local union.

In support of United Brotherhood's contention that the evidence was not sufficient to justify the jury's finding that the plaintiff's assailants were agents of United Brotherhood and were acting within the course and scope of their agency, it relies heavily on and quotes extensively in its brief from the decision of the Supreme Court in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570, 27 A. L. R. 762, and on subsequent appeal 268 U. S. 295, 69 L. ed. 963, 45 S. Ct. 551. It also cites *Adamson* v. *United Mine Workers of America*, 3 Utah 2d 37, 277 P. 2d 972; *United Construction Workers* v. *Haislip Baking Co.* (4 Cir. Va.), 223 F. 2d 872, cert. den. 350 U. S. 847, 100 L. ed. 754, 76 S. Ct. 87; and *Abernathy* v. *Romaczyk*, 202 Va. 328, 117 S. E. 2d 88. In our opinion the cases relied on are distinguishable on the facts from the present case.

In the *Coronado* case, *supra*, the evidence shows that the district union called the strike, made all the preparations for it, and paid all the bills incident thereto; that a specific stipulation in the laws governing the international and district bodies provided that the district would bear the responsibility of a strike called by it unless expressly assumed by the international; and that the international union did not aid in its maintenance or do anything to indicate that it was assuming the responsibility. On that evidence the Court held that there was no liability on the international for damages arising out of the strike. But the Court said, "If the international body had *interfered*, or if it had assumed liability by ratification, different questions would have arisen." (Emphasis added.) 259 U. S. at p. 395.

In the *Haislip* case, *supra*, an action was brought by the

employer to recover damages under § 301 of the Labor-Management Relations Act (29 U. S. C. A., § 185a) against the national labor union for the alleged breach of a collective bargaining contract. The Court held that the national labor union did not become liable for damages resulting from a "wildcat" strike called by the local union, which was wholly unauthorized and unsupported by the national union, merely because it had entered into a collective bargaining agreement with the employer requiring that grievances be settled by procedures provided for in the contract.

In the *Adamson* case, *supra*, the Court held that the action could not be maintained against the national union for damages for an assault and battery committed on a picket line since the evidence showed that the local union initiated the strike, and organized and controlled the picket line. The national union neither rendered financial assistance nor participated in any way. Moreover, there was no evidence that the tort-feasors were the parties involved in the labor dispute.

In the *Abernathy* case, *supra*, a truck driven by one of Abernathy's employees collided with an automobile in which Mrs. Romaczyk was a passenger and an argument arose between the drivers of the vehicles as to who was at fault, which was followed by a brief scuffle. Before the vehicles were moved another Abernathy truck arrived on the scene and bumped the standing vehicles. This caused another scuffle. In attempting to separate the parties Mrs. Romaczyk was injured and she recovered a judgment for damages. In setting aside the judgment against Abernathy we held that the truck driver, while participating in the fracas, had abandoned the business of his master and as a matter of

law was not acting within the scope of his employment, since the argument as to who had caused the collision had ended and a new fracas, to gratify the personal feelings of Abernathy's driver, had begun at the time Mrs. Romaczyk was assaulted.

A principal is responsible for the willful or malicious acts of his agent committed within the scope and course of his employment. The test of the liability of the principal for the tortious acts of his agent is not whether the tortious act itself is a transaction within the ordinary course of the business of the principal, or within the scope of the agent's authority, but whether the service itself in which the tortious act was done was within the ordinary course of such business or within the scope of such authority. *Henry Myers & Co.* v. *Lewis*, 121 Va. 50, 71, 92 S. E. 988, 994, 995; *Davis* v. *Merrill*, 133 Va. 69, 77, 78, 112 S. E. 628, 631; *Tri-State Coach Corp.* v. *Walsh*, 188 Va. 299, 304-308, 49 S. E. 2d 363, 366; 2 Am. Jur., Agency, § 360, pp. 279, 280; 35 Am. Jur., Master and Servant, § 560, p. 994, 995; 3 C. J. S., Agency, § 255, pp. 186-189; 57 C. J. S., Master and Servant, § 555, pp. 266, 267.

In *Davis* v. *Merrill*, *supra*, this Court quoted with approval from 2 Mechem on Agency, 2d ed., § 1960, the following definition of "scope of employment":

> "'In many cases, no better definition can be given than the words themselves suggest. But, in general terms, it may be said that an act is within the scope of the employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-ad-

visedly, with a view to further the master's interests, *or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business*, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.'" (Emphasis added.) 133 Va. at p. 77, 112 S. E. at pp. 630, 631.

A field representative of an international labor organization engaged in union organizational activities, negotiations of contracts, and settling grievances between employers and members of local unions, which are mere divisions of the international union, is engaged in the business of both the international and local unions so as to render both responsible for acts done by him within the scope and course of his employment. *United Mine Workers* v. *Patton* (4 Cir. Va.), 211 F. 2d 742, 746, 47 A. L. R. 2d 850, 857, cert. den. 348 U. S. 824, 99 L. ed. 649, 75 S. Ct. 38; 31 Am. Jur., Labor, § 136, p. 494; 87 C. J. S., Trade Unions, § 21, pp. 783, 784. In *United Constr. Wkrs.* v. *Laburnum*, 194 Va. 872, 886, 75 S. E. 2d 694, 704, affirmed 347 U. S. 656, 98 L. ed. 1025, 74 S. Ct. 833, we held that the very nature of the organization of the international union was sufficient to show that the district organization was an arm of the international, and an agency relationship existed between the two bodies.

Where an agency relationship has been established, the burden is on the principal to prove that the agent was not acting within the scope of his authority when he committed the acts complained of, and when the evidence leaves the question in doubt it becomes a factual issue for determination by the jury. *Alvey* v. *Butchkavitz*, 196 Va. 447,

453, 84 S. E. 2d 535, 539; *Slaughter* v. *Valleydale Packers*, 198 Va. 339, 343, 94 S. E. 2d 260, 263, 264.

When the above authorities are applied to the facts of the present case, we are of opinion that there was ample evidence for the jury to consider whether Price, Parks and the Stroutb brothers were acting as agents of United Brotherhood and within the course and scope of their authority in assaulting the plaintiff.

It is true that there was no evidence that the executive board of United Brotherhood adopted a formal resolution ordering or sanctioning the strike. However, there is evidence that Dishner and McKinney were agents of United Brotherhood and, with its knowledge and approval, were in command of the strike and the meetings of the local union. McKinney and Dishner advised the members of the local union how to conduct the strike and set up the picket lines. McKinney, with the approval of Dishner, directed them to "entertain" union members who returned to their jobs while the strike was in progress. If United Brotherhood had not sanctioned and approved the strike it would not have supported it financially.

Under the organizational structure of the international union, the local union was an arm of United Brotherhood. The members of the local union were members of United Brotherhood and its agents in conducting the strike.

It was in the interest of United Brotherhood that none of the strikers return to work until a satisfactory contract could be obtained from Bristol Door. Failure to obtain such a contract would cause the ultimate dissolution of the local union, thereby depriving United Brotherhood of revenue.

Even though the assaults on the plaintiff were ill advised, Price, Parks and the Stroud brothers followed the instructions of a United Brotherhood representative. The assaults were not committed to satisfy any personal motives of the assailants, but were caused by some emotion which naturally grew out of and was incident to the performance of strike activities. Hence, it was for the jury to say from the evidence whether the plaintiff's assailants were agents of United Brotherhood and if they were acting within the scope of their authority.

It is next said that the court erred in granting an instruction which told the jury that if they believed from a preponderance of the evidence that United Brotherhood ratified the acts of Price, Parks and the Stroud brothers it could be held liable for the assaults. United Brotherhood says that there was no evidence of ratification to support such instruction.

It is true that there was no ratification by United Brotherhood of the acts of the tort-feasors. However, the verdicts of the jury were not based on ratification. The jury specifically found in one of their verdicts that Price and Parks were "acting as agents of * * * United Brotherhood." It may be concluded that the second verdict would have contained the same quoted language if process had been served on the Stroud brothers. Since the jury specifically found that the tort-feasors were acting as agents of United Brotherhood, the error complained of was harmless. Moreover, United Brotherhood requested and obtained an instruction which told the jury that they must find for United Brotherhood if they believed that the tort-feasors were not its agents, "unless you further believe that the defendant [United Brotherhood] ratified their

acts." Thus it cannot complain of the language to the same effect used in the plaintiff's instruction.

For the reasons stated, the judgment is

Affirmed.

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Friday, the 31st day of August, 1962.

Record No. 5435.

United Brotherhood of Carpenters and Joiners of America, AFL-CIO,
Plaintiff in error,

against

Roscoe Humphreys,
Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Bristol on the 20th day of May, 1961.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed

with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be, and the same is hereby, affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him expended about his defense herein.

Which is ordered to be certified to the said corporation court.

Defendant in error's costs:

Attorney's fee	$50.00
Printing brief	40.00
Total	$90.00

Teste:

H. G. Turner, Clerk.

A Copy,
Teste:

H. G. Turner, Clerk.

CORPORATION COURT OF THE CITY OF BRISTOL, ON FRIDAY, THE 26th DAY OF MAY, IN THE YEAR OF OUR LORD, NINETEEN HUNDRED AND SIXTY-ONE.

ROSCOE HUMPHREYS

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

This day came again the parties in person and by counsel,

and the same jury which was present on yesterday appeared pursuant to their adjournment.

THEREUPON, after hearing the remainder of the evidence, receiving instructions from the Court, and hearing the argument of counsel, the jury retired to their room to consider of a verdict, and after some time, returned into Court, having found the following verdict, to-wit:

> "We the jury find for the plaintiff in the amount of $4.000.00 on the first claim jointly against Clayton Price and D. R. Parks, acting as agents of the Lumber and Sawmill Workers Union #3092 of Bristol, Va.; and United Brotherhood of Carpenters and Joiners of America AFL-CIO (2) Lumber and Sawmill Workers Union #3092 of Bristol, Va. (3) United Brotherhood of Carpenters and Joiners of America AFL-CIO.
>
> "S/ FRANK GOODPASTURE, JR.,
> Foreman"

> "We, the jury, find for the plaintiff in the amount of $7,000.00 on the second claim jointly against the Lumber & Sawmill Workers Union #3092 of Bristol, Va., and the United Brotherhood of Carpenters and Joiners of America AFL-CIO.
>
> "S/ FRANK GOODPASTURE, JR.
> Foreman."

Defendants, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, BY counsel, and D. R. Parks and Clayton Price, by counsel, moved the Court to

set aside the verdict as contrary to the law and the evidence, and without evidence to support it, and that the amounts are excessive for the damage alleged to be committed against the plaintiff, and upon further ground dictated into the record.

After hearing the argument of counsel, it is ordered that the motion to set aside the verdict be hereby overruled. Defendants, by counsel, except to the ruling of the Court.

THEREUPON, it is ordered and adjudged that the plaintiff, Roscoe Humphreys, have and recover jointly and severally of the defendants, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Lumber and Sawmill Workers Union No. 3092 the sum of Eleven Thousand ($11,000.00) Dollars, with interest at 6% from this date until paid; and that plaintiff have and recover of the defendants; D. R. Parks and Clayton Price, jointly and severally with each other and with United Brotherhood of Carpenters and Joiners of America; AFL-CIO, and Lumber and Sawmill Workers Union No. 3092, the sum of Four Thousand ($4,000.00) dollars, being a portion of the aforesaid sum of $11,000.00 with interest from this date until paid; and that plaintiff recover of all of said defendants his costs in this behalf expended.

A Copy—Teste:

BERTHA R. DRINKARD, Clerk

CODE OF VIRGINIA, 1950

§ 8-350. Allowing appeal when verdict reduced and accepted under protest.—In any action at law in which the

trial court shall require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remittitur and acceptance, if under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court of Appeals upon a writ of error awarded the plaintiff as in other actions at law; and in any such case in which a writ of error is awarded the defendant, the judgment of the court in requiring such remittitur may be the subject of review by the Supreme Court of Appeals, regardless of the amount.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.